United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7546

To be argued by
THEODORE L. MARKS

BRIEF

In The

United States Court of Appeals

For The Second Circuit

OSCAR GRUSS

Plaintiff-Appellee,

and

OSCAR GRUSS & SON,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY,

Defendant-Appellant.

B P/S

REPLY BRIEF FOR DEFENDANT-APPELLANT

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OSCAR GRUSS

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REPLY BRIEF FOR DEFENDANT-APPELLANT

STATEMENT

We do not wish to burden the Court with arguments and disagreements over Gruss' Statement of the Case, although we feel that several statements set forth therein are questionable and misleading. We are confident that the Court will arrive at its own conclusions by fully reviewing the Joint Appendix, particularly the portion containing expert testimony and exhibits dealing with the issue of valuation. However, we do feel it necessary to correct one, ambiquity, as set forth on page 5 of Gruss' brief. The statement that the Court below found no basis for receiving additional testimony is inaccurrate. In actual fact, the only additional material re-

jected by the Court was the affidavit of Beurt Ser Vaas bearing on the credibility of the witness Anreder. In discussion with both parties' counsel upon the argument of Curtis' post-trial motion, the Court indicated specifically that the remaining affidavits of Howard W. Taylor, Jr. and Harry L. Schroeder, with attached exhibits, would be accepted and considered (293a, 303a). This is borne out by the Court's Supplemental Findings, which reject only the Ser Vass affidavit (313a). Accordingly, Curtis has made no reference to the Ser Vaas affidavit upon this appeal.

Inasmuch as this reply brief consists of Curtis' response to Gruss' appellee's brief, the contents hereof have been numbered and lettered to the identical sections thereof.

ARGUMENT

POINT I.

LIABILITY

A. The Applicable Law

Gruss totally misses the point of Curtis' argument. At the time of the recapitalization vote, the SEC imposed upon corporations a legal obligation to supply proxy material to all of their record holders, not to beneficial owners. As a matter of fact, any obligations that existed at that time re-

specting beneficial owners were imposed upon record holders. Therefore, all of the information and instructions set forth in the proxy material was directed specifically to those individuals to whom the material was supplied, the record holder. Any other approach would have clearly been misleading and actionable.

Despite the above, Gruss continues to use the lower Court's phrase, "trap for the unwary", as though Curtis deliberately prepared its material in a manner calculated to produce a mistake. This is sheer nonsense. With apologies to the Court for belaboring the point, the reality is that Gruss was the only party that improperly exercised its written objection, and we submit that the underlying cause therefor was not an omission by Curtis, but rather the usual and slipshod manner in which Gruss and Anreder treated the matter. We again point out the indisputable facts that all other dissenting shareholders exercised their objections in correct form (293a), and that there is no reported instance of a Pennsylvania shareholder having ever been misled by the identical language (303a).

C-2. Materiality of Omission.

We again emphasize that the only testimony rejected on Curtis' post-trial motion was the affidavit of Beurt Ser Vaas.

Contrary to Gruss' assertion, the affidavit of Harry L. Schroeder respecting the manner in which other dissenters exercised their objections was accepted and considered by the lower Court (293a).

C-3. Applicability of Law to Statutory Procedural Information.

We stand by our argument that the relevant sections of the statute have never been applied by the courts to procedural information. Gruss, in spite of his smug statements, fails to cite a single decision to refute our contention.

C-4 (a) and (b). Gruss' Negligence.

In his argument respecting contributory negligence, Gruss overlooks the most basic element thereof, the fact that Gruss and/or Gruss & Son left it entirely up to their Director of Research, Anreder, to exercise the written objection, instead of putting the material in the hands of their proxy department, which they concede was the customary manner in which such material was handled (87a). Beyond that, Anreder himself failed to seek any advice or guidance from the proxy department, although both were situated in the same premises. To put it another way, it cannot be denied that an outside beneficial owner would have had a valid cause of action against Gruss & Son if this same procedure had been followed.

C-4 (c). Additional Evidence.

For the third and hopefully the last time, we state that the affidavits of Schroeder and Taylor were accepted and considered by the lower Court upon Curtis' post-trial motion.

C-4(e). Measure of Negligence.

Gruss' arguments respecting negligence per se and breach of statutory duty are wholly inapplicable. If they were valid, there would be no federal authority on the subject of negligence under the securities acts, since every instance of negligence found by the courts in this area derives from a specific statutory duty. Yet scores of decisions exist, from the U.S. Supreme Court on down, which deal with the interpretations of the statute and the standard of negligence to be applied thereunder. See, for example, Mills v. Electric Auto Light Co., 396 U.S. 375; Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2nd Cir. 1973). Even the Court below, in its Supplemental Finding, No. 2 (313a), hesitates and covers its tracks in setting forth this novel theory. Furthermore, with the exception of Lewis v. Dansker, CCH Fed. Sec. L. Rep. ¶93,916 (S.D.N.Y. 1973), cited by Gruss, neither he nor the Court below have found a single authority to support their contention respecting Section 14(a) of the 1934 Act. And as to Lewis, supra, what the Court actually

stated was that a party cannot evade liability by claiming that any errors made were on the part of his attorneys. This is a far cry from the proposition of absolute liability for breach of a statutory duty.

It should also be noted that Gruss' argument assumes that the statute requires a printing or explanation of the general definition section of the PCL in addition to all of the other material printed and summarized by Curtis. It is this very assumption that stands as a crucial liability issue in this case.

POINT II

VALUATION

A. Applicable Law.

There can be only one measure of damages in this action, to wit, the valuation that would have been found by the Pennsylvania Court had the parties submitted to an appraisal proceeding (271a, 272a). Any other measure referred to or applied by Gruss or the lower Court is clearly inapplicable. Accordingly, the views of the New York Court of Appeals are totally irrelevant, and only serve to point up the fact that neither Gruss nor the lower Court have found any Pennsylvania precedent to support the grossly excessive and clearly erroneous valuation

found below. As Gruss' own brief indicates, the Endicott Johnson decision relates to an appraisal of securities under Section 623 of the New York BCL. Furthermore, we are here dealing with a valuation finding so unsupported and excessive as to be reversible under even the most restrictive interpretation of an appellate court's authority.

B. Factors Applied by Court Below.

Gruss has failed to in any way refute or overcome the Pennsylvania law cited in our main brief to the effect that where there is an actual market price for preferred stock, that is the measure of its market value. Furthermore, even if the market price of the common stock were applied (which would be incorrect), the valuation of the preferred would come out to approximately one-third of the value found by the Court below. The hypothetical valuation that Anreder attempted to put in evidence was properly rejected by the lower Court and cannot be considered upon this appeal, although it is interesting to note that this excluded testimony in the actual source of the $15 per share figure put forward by Anreder and adopted below.

Gruss spends the balance of this section ignoring Pennsylvania authority and attempting to apply New York law. As pre-

viously discussed, the proper measure of damages in this action precludes any such argument.

C. Testimony of Experts

Gruss here seems to be conceding that the lower Court's valuation theory should be disregarded, a point of view with which we thoroughly agree. This leaves the testimony of Gruss' expert, Anreder, (without the excluded hypothetical valuation) which in no way even begins to support the $15 per share valuation opined by him. It should be emphasized that this is not a question of which expert the Court should believe. The fact is that the record gives no evidentiary support whatsoever to the valuation pulled from the air by Gruss. A fair and detached reading of the financial statements which are a part of the record, plus the actual market price history of the stock, completely annihilates the puffs of conjecture raised by Gruss' employee, Anreder, while wearing his appraisal experts' hat.

D. Weighing of Testimony by Court Below.

Gruss' characterization of the testimony of Curtis' expert should be tested by reviewing the testimony itself, and, incidentally, by reading it in full and not relying on the distorted version advanced by Gruss. The same test should be applied to the testimony of Gruss' expert. The entire trans-

cript is set forth in the Joint Appendix, as are the financial records and statements of Curtis which stand uncontradicted.

E. Valuation Based on 1986 Redemption.

If any more evidence of the conjectural nature of Gruss' valuation arguments is required, we need only point to this section of his brief. Starting with the "turnaround" of Curtis, and proceeding through fourteen successful years to 1986 (ignoring the fact that, with the exception of an extraordinary item for one year, the ten years preceding 1972 all resulted in substantial losses), Gruss finds the company with sufficient funds to pay off the $16,466,000 of debentures with accrued interest. Not only that, but the company will be so solid that its preferred stock would have substantial value, whether or not Curtis had any prospects of accumulating the $45,070,000 required to redeem it. And all of this is to be found as of September 13, 1972, based upon the following facts:

1. While the figures were obviously not available for the full year, it appeared that the company might finally show a small net profit for 1972. In fact, that profit turned out to be approximately $41,000, which on a fourteen year projection would leave it $15,892,000 short of the amount necessary to pay off the debentures, much less to be applied against the preferred

stock. To pay the debentures alone, Curtis would require an annual net profit or cash flow not of $41,000, but of $1,179,000. And even this would leave not one cent for the preferred stock.

2. The president of the company had a very successful background.

3. The Saturday Evening Post, which had been terminated because of its multi-million dollar losses, had been revived.

4. The company owned some mining royalty rights which might have been worth as much as $2,000,000, and in fact were subsequently sold for $1,000,000.

5. The highest market price applicable to the preferred stock, disregarding substantially lower prices for the balance of the preceding period, was $4.75 per share.

6. The net asset value of Curtis was a negative figure.

We challenge Gruss to show how a valuation of $15 per share based upon the above facts can possibly be anything but conjecture and wild speculation. If any less conjectural bases exist on the record, let Gruss set them forth. Otherwise, this Court should have no choice but to reject the valuation found by the lower Court.

F. Curtis' Financial Prospects.

Gruss must establish far more than the mere fact that

Curtis might not go bankrupt. By going through the oft-attempted exercise of setting up this straw-man and knocking it down, Gruss seeks to obscure the fact that the record fails to provide any factual basis to support his contention as to the future profitability of Curtis. All we ask is that this Court disregard conjecture and theory, and base its decision upon the testimony and evidence in the record. We are confident that such procedure must result in a decision favorable to Curtis.

CONCLUSION

1. The weight of the evidence and the application of the appropriate principles of law compel a reversal of the lower Courts' judgment and a finding that Curtis did not violate Rules 14(a)-9a and 101 of the Securities Exchange Act of 1934.

2. In the alternative, the Court should direct the taking of additional testimony as contained in the affidavits submitted by Curtis upon its motions under Rules 52 and 59 FRCP.

3. If liability is affirmed, the judgment should be reversed as to damages and the Court should find damages in an amount not greater than $18,400.

Respectfully submitted,

Lee Cash & Marks

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On the Brief:
Theodore L. Marks

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES SUPREME COURT
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- against -

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 20 *day of* Feb *1976 at* **122 East 42nd Street, New York, New York**

deponent served the annexed **Reply Brief** *upon*

KASS GOODKIND WECHSLER & GERSYEIN
the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 20
day of February *19* 76

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977